Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE
# Supreme Court of the United States

Edward VanGuilder,

*Petitioner*,

v.

State of New York,

*Respondent*.

## Petition for a Writ of *Certiorari*

**To the New York State Court of Appeals**

Edward VanGuilder, *pro se*
241 Fox Road
N. Granville, NY 12854
(518) 642-2448

## The Question Presented

Legal standing to defend or to surrender the residual indigenous sovereignty of the Mahican Nation of southern New York State vests, either, in the federal government of the United States of America in trust for the expatriate Stockbridge-Munsee Indian Band of Wisconsin; or, alternatively, in the contender VanGuilder's local Mahican band, which claims to have evaded the exodus of the Mahican Nation to Wisconsin.

Before departing for new reservation lands in Wisconsin the rest of the indigenous Mahican Nation deeded over to VanGuilder stay-behinds the previously reserved indigenous territory of the Mahican Nation in New York and Massachusetts. Treaty, April 25, 1724; Deed, October 24, 1737; Deed, June 1, 1756.

Does not this confer legal standing to defend or to surrender the above described indigenous sovereignty under the constitutional law without regard for the federal and state law? And has not always New York's beneficial interest been subject to the indigenous sovereignty, pending registration on title to any given parcel of a Treaty?

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## Opinions Below

The courts below held Congress and the federal court system constituted by Congress have vested legal standing to argue constitutional law indigenous sovereignty, exclusively, in non-indigenous governments constituted under and subject to federal law.

The alternative for which VanGuilder contends based upon the constitutional accord between the indigenous constitution of the Iroquois and Allied Confederacy, and the constitution adopted by the United States of America, is thought not to be arguable, in any court empowered to adjudicate in the United States of America.

The international and constitutional law indigenous sovereignty, it is mistakenly thought, has been repealed by the combination of federal legislation, federal common law and "treaties" between the federal government and its agents the non-indigenous federal law "Indian" governments.

Therefore VanGuilder's claim summarily was dismissed without being read, for irrebuttably presumed impossibility of legal standing.

## Jurisdiction

The judicial Power exists to maintain the constitutional checks and balances which precludes the pretence of federal sovereignty. *Scott v. Sandford*, 19 How. 393 (1857).

## Statement of the Case

The federal government as trustee backs the Stockbridge-Munsee Indian Band as its *cestui que trust* under federal law and, correspondingly, on behalf of them both denies the arguability of the alternative legal standing for which VanGuilder contends, based solely upon constitutional law.

The said *cestui que trust* with the approbation of the federal government as its trustee contemporaneously is in the process of surrendering, by contract with the Governor of New York dated December 7, 2005, the residual

constitutional law interest based upon the indigenous sovereignty of the Mahican Nation of southern New York.

VanGuilder wishes to adduce into evidence registered title evidence confirming the quit-claim of the indigenous territory to his band from the rest of bands comprising the indigenous Mahican Nation. Treaty of April 25, 1724; Indian Deed of October 24, 1737. Indian Deed of June 1, 1756. *An Act to prevent and make void clandestine and illegal purchases of lands from the Indians,* Stat. Prov. Mass. Bay 1701-02, c. 11, s. 5.

The federal government as trustee in right of its *cestui que trust* the Stockbridge-Munsee Band have been selling and re-selling the same indigenous territory the Mahican Nation previously quit-claimed to VanGuilder, which stayed behind. *An Act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi*, U.S. Stat., I830, c. 148, §1.

Treaty of November 24, 1848, rider confirming the omnibus nature and character of the surrender.

On December 7, 2004, the Stockbridge-Munsee Band of Wisconsin and the State of New York, with federal government approbation, contracted for yet another fraudulent surrender indigenous territory in New York. They are extinguishing the indigenous sovereignty of the indigenous territory that since at last 1756 has been vested in VanGuilder's Band alone by operation of constitutional law alone.

## Relief Requested

VanGuilder asks for a declaration the controlling law is the constitutional legislation and precedents up to and including *Holden v. Joy* in 1872, not modified by the federal legislation and precedents 1871-present. Appendix.

## Reasons for Allowing the Writ

The chief justice below held VanGuilder's claim did not lie under the constitution of the State

of New York and a New York State procedural regulation, and on this basis declined jurisdiction to address the conflicting constitutional legislation and precedents to the contrary presented by VanGuilder.

The literal and intended meaning of the words of the *Constitution* as understood when framed, and as construed by this supreme Court's original and authoritative precedents, is the controlling law.

That certainty is the cornerstone of the legal infrastructure the resistance to the modification of which other than by means of Art. V, is the constitutive essence of constitutional democracy.

## Conclusion

THAT the writ should be sent out.

**February 23, 2005.** **Respectfully submitted,**

/s/_____
**Edward VanGuilder**

(*pro se*)

Index No. 6079

SUPREME COURT OF NEW YORK
WASHINGTON COUNTY

BETWEEN:

Edward VanGuilder

AND:

State of New York

CLAIM

(1) Mahican title to the Hudson River drainage basin vests in the plaintiff.

THEREFORE plaintiff seeks a declaration that as a matter of constitutional law alone the defendant's constitutional interest therein *prima facie* is "subject to" that title.

June 16, 2004.

Respectfully submitted,

/s/

Edward VanGuilder
241 Fox Road
P.O. Box 139
North Granville, N.Y. 12854
(518) 642-2448

TO: CLERK OF THE COURT
AND TO: GOVERNOR OF NEW YORK
AND TO: ATTORNEY GENERAL OF NEW YORK

**STATE OF NEW YORK**
**SUPREME COURT** COUNTY OF WASHINGTON

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EDWARD VANGUILDER,

Plaintiff,

**DECISION AND ORDER**

-against-

RJI No. 57-1-2002-0300
Index No. 6079

THE STATE OF NEW YORK,

Defendant.

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**Appearances:**
**Edward VanGuilder, Plaintiff, Pro se.**

**KROGMANN, J.**

**Application for an Order to Show Cause filed by Plaintiff, Pro Se.**

The plaintiff has filed with this Court an "Application for an Order to Show Cause". Annexed thereto along with other filings is found a document entitled "Claim" wherein it appears that the plaintiff is seeking a determination that as a matter of Constitutional Law, the defendant's Constitutional interest in and to the Hudson River drainage basin is subject to Mahican title and therefore vests in the plaintiff.

Upon due consideration of the foregoing and a full review of the additional filing made by the plaintiff who appears pro se in response to the requests of the Court, the plaintiff's Application for an Order to Show Cause is denied based upon a lack of jurisdiction and a failure to state a claim upon which relief may be granted.

With the adoption of the Constitution, Indian relations became the exclusive province of federal law. Oneida Indian Nation v. County of Oneida, 44 US 661 (1974) (Oneida I). It is well established that Indians have a federal common law right to sue to enforce their aboriginal land rights, but such determinations are a matter for the federal courts. In addition, the plaintiff has failed to establish his statutory standing to assert the rights under his "Claim."

**The within constitutes the Decision and Order of this Court.**

DATED: October 29, 2004

/s/
HON. DAVID B. KROGMANN
JUSTICE OF THE SUPREME COURT

The Court is filing the original decision and order together with the original papers in the appropriate County Clerk's Office.

Distribution:
Edward VanGuilder, Pro Se

State of New York,
Court of Appeals

*At a session of the Court, held at Court of Appeals Hall in the City of Albany on the* sixth *day of* January 2005

Present, HON. JUDITH S. KAYE. *Chief Judge, presiding.*

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Mo. No. 1184 SSD 78

Edward VanGuilder,

Appellant,

v.

State of New York,

Respondent.

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The appellant having filed notice of appeal in the above title and due consideration having been hereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that it does not lie (see, NY Const, art VI, §3(b); CPLR 5601).

/s/

Stuart M. Cohen
Clerk of the Court

## THE INDIGENOUS CONSTITUTION

***Kaianereh'ko:wa,* Time Immemorial. Excerpted from, Ohontsa Films, *GAYANEREKOWA: The Constitution of the Iroquois Confederacy,* 1993, at page 6.**

MOHAWK COUNCIL

Fire Keepers

BEAR CLAN ROTIYANER

TURTLE CLAN ROTIYANER

WOLF CLAN ROTIYANER

The council of the Mohawks shall be divided into three parties: The Bear Clan Chiefs, Tehanakarine, Ostawenserentha and Soskowharowane are the first. The Turtle Clan Chiefs Tekarihhoken, Ayonwatha and Satekariwate are the second. The Wolf Clan Chiefs Sarenhowane, Teyonhekwen and Orenrekowa are the third. The first part is to listen only to the discussion of the second and third parties and if an error is made, or the proceedings irregular, they are to call attention to it and when the case is right and properly decided by the two parties, they shall confirm the decision of the two parties (and refer the case to the Seneca Chiefs if it's a Grand Council). The Well Keeper of the Turtle Clan, Chief Tekarihoken announces the subject to be discussed and

passes the issue over Council Fire to the Wolf Clan Chiefs for their decision. No one else but the Chiefs may speak when the Chiefs' Council is in session. The Wolf Clan Chiefs deliberate in low tones and when arrived at a decision, their Speaker stands up and passes their decision over the Fire to the Turtle Clan Chiefs. In turn the Turtle Clan Chiefs deliberate and come to a decision which in this instance is the same as that of the Wolf Clan Chiefs. The Turtle Clan Speaker announces the decision of the Turtle Clan Chiefs to the Wolf Clan Chiefs and passes on their joint decision to the Bear Clan Chiefs who shall then confirm the decision of the two parties and declare the issue passed and asks does the Well Keeper have any other issues?

In the event that the Turtle Clan Chiefs disagree with the decision of the Wolf Clan Chiefs, the Fire Keepers (Bear Clan Chiefs) shall invoke the rule that the two sides must deliberate again and because of the new information revealed by the disagreement, the two sides are now likely to agree and in coming to an agreement the issue is confirmed and passed by the fire keepers, the Bear Clan Chiefs. Should the Turtle Clan Chiefs and Wolf Clan Chiefs come up with the same disagreement in their second deliberation, the Fire Keepers shall then render a decision they see fit in case of a disagreement by the two bodies. (Wampum 10).

Should the fire Keepers, the Bear Clan Chiefs, disagree with the decisions of the Wolf Clan Chiefs and the Turtle Clan Chiefs whose decisions are the same, the same rule must again be applied and the Turtle Clan Chiefs must once again deliberate on the issue and the Wolf Clan Chiefs must

do the same. If their decisions are the same as before, the Fire Keepers, the Bear Clan Chiefs have to go along with their decisions and are compelled to confirm their joint decision.

WAMPUM #16. IN CASE A NEW LAW IS MADE

If the conditions which shall arise at any time call for an addition or change of this law, the case shall be Carefully considered and if a new beam seems necessary or beneficial, the proposed change shall be decided upon and if adopted, shall be called, "Added to the Rafters."

WAMPUM #17. CLAN MOTHERS TO HOLD CHIEFTAINSHIP TITLES VIA WAMPUM STRINGS

A bunch of certain shell (wampum) strings, each two spans in length, shall be given to each of the female families in which the chieftainship titles are vested. The right of bestowing the titles shall be hereditary n the family of females legally possessing the bunch of shell strings and the strings shall be the token that the females of the family have the ownership of the chieftainship title for all time to come, subject to certain restrictions mentioned herein.

WAMPUM #25. CHIEF SEEKING INDEPENDENT AUTHORITY WILL BE DEPOSED.

If a chief of the League should seek to establish any authority independent of the League of the Great Peace, which is the Five Nations, he shall be warned three times in open Council: first by the women relatives, second by the

men relatives, and finally by the chiefs of the Nation to which he belongs.

If the offending chief is still persistent, he shall be dismissed by the War Chief of this Nation for refusing to conform to the laws of the Great Peace. His Nation shall install the candidate nominated by the female name holders of his family.

*Note: Again, the "relatives" are the people of the Clan. Political relatives. The "female name holders of his family" are the Clan Mothers of the Clan. The "name" is the title given to each Royaner while he is going through the ceremony of becoming Royaner. The title he gets is the name of the original Chief whose place he assumes when installed as Royaner.*

WAMPUM #36. THE TITLE NAMES OF THE FIVE WAR CHIEFS.

The title names of the War Chiefs of the League shall be:

Ayonwehs: war chief under Chief Tekarihoken (Mohawk).
Kahonwaitiron: war chief under Chief Otatsheteh (Oneida).
Ayentes: war chief under Chief Atotarho (Onondaga).
Wenens: war chief under Chief Dekaenyon (Cayuga).
Shoneratowaneh: war chief under Chief Skanyatariio (Seneca).

The women heirs of each chief's title shall be the heirs of war chief's title of their respective chief.

The war chiefs shall be selected from the eligible sons of the female families holding the chieftainship title.

*Note:...Gayanerekowa has definite functions for the War Chief and his men (Warrior Society). They are charged with the protection, defence and welfare of the people. These duties may take many forms, such as keeping the peace, teaching, speaking to the people, repossessing lost lands, maintaining human rights, diplomatic relations with other nations, and any work that promotes the welfare of the people.*

WAMPUM #44. LINEAL DESCENT OF THE PEOPLE RUNS IN THE FEMALE LINE

The lineal descent of the people of the Five Nations shall run in the female line. Women shall be considered the Progenitors of the Nation. They shall own the land and the soil. Men and women shall follow the status of their mothers.

WAMPUM #45. THE CLAN MOTHERS, WOMEN TITLE HOLDERS

The women heirs of the chieftainship titles of the League shall be called Oyaner or Otiyaner for all time to come.

*Note: The Clan Mothers shall be called Oyaner. Oyaner is derived from the word Oyana meaning "path". Oyaner is the female "good path maker." Otiyaner is in the plural. Royaner means, "he makes a good path for people to follow." Rotiyaner is in the plural.*

WAMPUM #58. ANY CHIEF OR OTHERS PERSONS WHO SUBMIT TO LAWS OF A FOREIGN PEOPLE ARE ALIENATED AND FORFEIT ALL CLAIMS IN THE IROQUOIS NATIONS.

There are now the Five Nations League Chiefs standing with joined hands in a circle. This signifies and provides that should any of the chiefs of the League leave the Council and the League, his crown of deer's antlers, the emblem of his chieftainship title, joined with his birth right, shall lodge on the arms of the union chiefs whose hands are so joined. He forfeits his title and the crown falls from his brow, but it shall remain in the League.

A further meaning of this is that if, at any time, anyone of the chiefs of the League choose to submit to the law of a foreign people, he is no longer in but out of the League and persons of this class shall be called, "they have alienated themselves" (Tonatonkoton). Likewise, such persons who submit to laws of foreign nations shall forfeit all birthrights and claims of the League of Five Nations and territory.

You, the League of Five Nations Chiefs, be firm so that if a tree should fall upon your joined hands, it shall not separate you or weaken your hold. So shall the strength of the union be preserved.

*Note: This means that the Indians who follow the laws made by foreigners, and it includes Canada's Indian Act and the United States Federal Indian Law, have alienated themselves from their own nations. That is why an Indian such a Mohawk who voted in the elections devised by the Canadian or United States governments have to be*

*reinstated in a special ceremony to regain their lost Iroquois citizenship which they lost by the simple act of voting in the Canadian Band Council or United States Tribal Council elections, as well voting in Canada's national or the United States national elections. "Code" means a body of laws of a nation. Accepting the Handsome Lake Code which is a Quaker Code is a violation of this Wampum #58 of the Great Law.*

WAMPUM #78. FOREIGN NATIONS URGED TO ACCEPT THE GREAT PEACE

Whenever a foreign nation enters the League or accepts the Great Peace, the Five Nations and the foreign nation shall enter into an agreement and compact by which the foreign nation shall endeavor to persuade the other nations to accept the Great Peace.

*Note: They asked other nations to help spread peace among mankind.*

# ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE NORTH AMERICAN COLONIES, SIGNED AT PHILADELPHIA, 20 MAY 1775.

Article XI.

A perpetual alliance, offensive and defensive, is to be entered into, as soon as may be, with the Six Nations; their limits ascertained, and to be secured to them; their lands not to be encroached on, nor any private or colony purchase to be made of them hereafter to be held good, nor any contract for lands to be made, but between the great council of the Indians at Onondaga and the general Congress. The boundaries and lands of all the other Indians shall also be ascertained and secured to them in the same manner; and persons appointed to reside among them in proper districts, who shall take care to prevent injustice in the trade with them; and be enabled at our general expence, by occasional small supplies, to relieve their personal wants and distresses; and all purchases form them shall be made by Congress, for the general advantage and benefit of the united colonies.

# CONSTITUTION OF THE UNITED STATES OF AMERICA

## Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

# [NON-INDIGENOUS "CONSTITUTION"

# OF

# _____]

# STOCKBRIDGE-MUNSEE COMMUNITY

# WISCONSIN

# APPROVED NOVEMBER 18, 1937

## PREAMBLE

We, the people of the Stockbridge-Munsee Band of Mohican Indians, grateful to the Great Spirit for his fostering care, in order to re-establish our tribal organization, to conserve and develop our common resources and to protect the welfare of ourselves and our descendants, do ordain and establish this Constitution and By-laws.

## ARTICLE I Name

The name of this Community shall be "The Stockbridge-Munsee Community".

## ARTICLE II Territory

The jurisdiction of the Stockbridge-Munsee Community shall extend to all lands purchased, heretofore or hereafter, by the United States for the benefit of said Community.

ARTICLE III Membership

SECTION 1. The membership of the Stockbridge-Munsee Community shall be composed of all persons whose names appear on the Stockbridge Allotment Roll of 1910 and who are residing within the original confines of the Stockbridge Reservation, in Shawano County, State of Wisconsin, on the date of the adoption of this Constitution and By-laws.

SEC. 2. Descendants of members of the Community, as provided for in Section 1 of this Article, shall be members provided such descendants are of one-fourth or more Stockbridge-Munsee Indian blood and are residing within the original confines of the Stockbridge Reservation on the date of the adoption of this Constitution and By-laws.

SEC. 3. All children of one-fourth or more Indian blood born to members of the Community shall be members; Provided, that the parents are residents of the Community on the date of the birth of said child.

SEC. 4. The Tribal Council shall have authority to promulgate ordinances, subject to the approval of the Secretary of the Interior, governing the adoption of new members and loss of membership in the Community.

ARTICLE IV Governing Body

SEC. 1. The governing body of the Stockbridge-Munsee Community shall be a Tribal Council, composed of a President, a Vice-President, a Treasurer and four Councilmen, to be elected by popular referendum.

SEC. 2. The officers and councilmen shall be elected as follows: The President and Treasurer shall be elected for a term of two years, the Vice-President and four councilmen shall be elected for a term of one year.

SEC. 3. The Tribal Council shall have authority to appoint a Secretary and such boards and committees as may be deemed necessary.

SEC. 4. Any member of the Stockbridge-Munsee Community is eligible to be elected to the Tribal Council: Provided, that he is 25 years of age or over and has maintained a continuous residence in the community for at least one year immediately preceding his election.

SEC. 5. Any member of the Community who is 21 years of age or over shall be entitled to vote in any election at which he presents himself at the polls on election day during the official voting hours.

SEC. 6. The present Business Committee shall call, hold, and supervise the first Tribal Council election within 60 days after the adoption and approval of this Constitution and By-laws under such rules and regulations as the committee may provide. The Tribal Council shall provide by ordinance, rules and regulations governing the date and manner of holding future elections.

ARTICLE V Removal

SEC. 1 - The Tribal Council may, by an affirmative vote of five, expel any member of the Council for neglect of duty or gross misconduct PROVIDED that the accused Tribal

Council member shall be given full and fair opportunity to reply to any and all charges at a designated Council meeting. The accused shall be given a written statement of the charges at least five (5) days before the meeting at which the charges are to be heard.

SEC. 2 - The members of the Stockbridge-Munsee Community shall have power to remove Council members through a recall election. The Tribal Council shall not have jurisdiction over the recall election process. The recall election process shall be conducted in accordance with the following procedures:

a) the petitioners shall form an election board consisting of five members to oversee and conduct the recall election process;

b) upon receipt of a petition signed by at least one-third of the number of those voting in the last general election, it shall be the duty of the recall election board to certify the validity of the signatures on the recall petitions, and to call for an election to be held not more than thirty days from the submission of the recall petition;

c) individual petitions shall be circulated for each Council member who is subject to recall.

SEC. 3 - No Council member recalled or removed shall be eligible to run or hold office for four (4) years from the date of removal from office.

SEC. 4 - If a Council member should die, resign, or be removed from office, under either Section 1 or Section 2 of

this Article, the Tribal Council shall declare the position vacant. The Tribal Council shall fill a vacancy by special election unless less than ninety (90) days remain in the term, in which case the Tribal Council shall leave the position vacant. The person who fills the vacant position shall only serve out the term of the person being replaced.

ARTICLE VI Referendum

Upon a petition of at least 30 per cent of the eligible voters of the Community, any enacted or proposed ordinances, resolution or other regulative act of the Tribal Council shall be submitted to a referendum of the qualified voters of the Community.

ARTICLE VII Powers

SECTION 1. Enumerated Powers--The Tribal Council of the Stockbridge-Munsee Community shall exercise the following powers, subject to any limitations imposed by the Constitution and laws of the United States and this Constitution and By-laws.

(a) To negotiate with the Federal, state, and local governments;

(b) To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior;

(c) To veto any sale, disposition, lease, or encumbrance of Community lands, interest in lands, or other Community assets;

(d) To advise with the Secretary of the Interior with regard to all appropriation estimates or Federal projects for the benefit of the Community prior to the submission of such estimates to the Bureau of the Budget and to Congress;

(e) To manage all economic affairs and enterprises of the community in accordance with the terms of a charter that may be issued to the Community by the Secretary of the Interior;

(f) To promulgate and enforce ordinances, subject to the approval of the Secretary of the Interior, governing the conduct of members of the Community; providing for the manner of making, holding, and revoking assignments of land or interest therein; providing for the levying of assessments on members of the Community and the appropriation of available community funds for public purposes; providing for the licensing of nonmembers coming upon the reservation for purposes of hunting, fishing, trading, or other business, and for the exclusion from the territory of the Community of persons not so licensed; and establishing proper agencies for law enforcement in the Community; Provided, that no assessments made on the members of the Community shall be effective until ratified by a majority vote in an election called for that purpose in which at least 30 per cent of the qualified voters shall vote.

(g) To charter subordinate organizations, subject to the approval of the Secretary of the Interior, for economic purposes and to delegate to such organizations, or to any subordinate boards or officials of the Community any of

the foregoing powers, reserving the right to review any action taken by virtue of such delegated power;

(h) To adopt resolutions not inconsistent with this Constitution and By-laws, regulating the procedure of the Tribal Council itself and of other agencies, officials, and organizations of the Community.

SEC. 2. Future Powers--The Tribal Council may exercise such further powers as may in the future be delegated to the Council by members of the Community, or by the Secretary of the Interior, or any other duly authorized official or agency of the State or Federal Government.

SEC. 3. Reserved Powers--Any rights and powers heretofore vested in the Stockbridge and Munsee Band of Mohican Indians, but not expressly referred to in this Constitution, shall not be abridged by this Article, but may be exercised by the Community through the adoption of appropriate by-laws and constitutional amendments.

SEC. 4. Any resolution or ordinance which by the terms of this Constitution, is subject to review by the Secretary of the Interior shall be presented to the Superintendent of the reservation who shall, within ten days thereafter, approve or disapprove the same.

If the Superintendent shall approve any ordinance or resolution, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may, within 90 days from the date of enactment, rescind the said

ordinance or resolution for any cause, by notifying the tribal council of such rescission.

If the Superintendent shall refuse to approve any ordinance or resolution submitted to him, within ten days after its enactment, he shall advise the Council of his reasons therefore. If these reasons appear to the Council insufficient, it may, by a majority vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within 90 days from the date of its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective.

ARTICLE VIII Amendments

This Constitution and By-laws may be amended by a majority vote of the qualified voters of the Community at an election called for that purpose by the Secretary of the Interior; Provided, that at least 30 per cent of those entitled to vote shall vote in such election; but no amendment shall become effective until it shall have been approved by the Secretary of the Interior.

It shall be the duty of the Secretary of the Interior to call an election on any proposed amendment upon the receipt of a petition submitted by the Tribal Council, signed by not less than one-third of the qualified voters of the Stockbridge-Munsee Community.

## BY-LAWS OF THE STOCKBRIDGE-MUNSEE COMMUNITY

ARTICLE I Duties of Officers

SECTION 1. Duties of the President--It shall be the duty of the President to preside over all meetings of the Council and to carry out the orders of the Tribal Council. It shall be the duty of the President to countersign all checks drawn against the funds of the Community by the treasurer.

ARTICLE III Oath of Office

Each member of the Tribal Council and each officer, or subordinate officer, elected or appointed hereunder, shall take an oath of office prior to assuming the duties thereof, by which oath he shall pledge himself to support and defend the Constitution of the United States and this Constitution and By-laws.

ARTICLE IV Ratification

This constitution and By-laws when adopted by a majority vote of the qualified voters of the Stockbridge and Munsee Band of Mohican Indians, voting at a special election called by the Secretary of the Interior, in which at least 30 per cent of those entitled to vote shall vote; shall be submitted to the Secretary of the Interior for his approval, and shall be effective from the date of such approval.

## CERTIFICATION OF ADOPTION

Pursuant to an order, approved October 4, 1937 by the Assistant Secretary of the Interior, the attached Constitution

and By-laws was submitted for ratification to the qualified voters of the Stockbridge and Munsee Band of Mohican Indians of Wisconsin, and was on October 30, 1937 duly ratified by a vote of 119 for, and 13 against in an election in which over 30 per cent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

*An Act concerning purchases of lands from the Indians*, Stat. Prov. NY 1684, c. 9. Bee itt Enacted by this Gen'll Assembly and by the authority of the same that from henceforward noe Purchase of Lands from the Indians shall be deemed a good Title without Leave first had and obtaineid from the Governor signified by a Warrant under his hand and Seale and entered on Record in the Secretaries office att New Yorke and Satisfaction for the said Purchase acknowlidged by the Indians from whome the Purchase was made is to bee Recorded likewise which Purchase soe made and prosecuted and entered on Record in the office aforesaid shall from that time be Vallid to all intents and purposes.

*An Act to prevent and make void clandestine and illegal purchases of lands from the Indians*, Stat. Prov. Mass. Bay 1701-02, c. 11. WHEREAS the government of the late colonys of the Massachusetts Bay and New Plymouth, to the intent the native Indians might not be injured or defeated of their just rights and possessions, or be imposed on and abused in selling and disposing of their lands, and thereby deprive themselves of such places as were suitable for their settlement and improvements, did, by an act and law named in the said colonys respectively many years since, inhibit and forbid all persons purchasing any land of the Indians without the licence and approbation of the general court, notwithstanding which, sundry persons for private lucre have presumed to make purchases of lands from the Indians, not having any license or approbation as aforesaid for the same, to the injury of the natives, and great disquiet and disturbance of many of the inhabitants of this province in the peaceable possession of their lands and

inheritances lawfully acquired; therefore, for the vacating of such illegal purchases, and preventing of the like for the future,—*Be it enacted and declared by the Lieutenant-Governor, Council and Representatives in General Court assembled, and by the authority of the same,*

[SECT. 1.] That all deeds of bargain, sale, lease, release or quit-claim, titles and conveyances whatsoever, of any lands, tenements or hereditaments within this province, as well for term of years as forever, had, made, gotten, procured or obtained from any Indian or Indians by any person or persons whatsoever, at any time or times since the year of our Lord one thousand six hundred thirty-three, without the license or approbation of the respective general courts of the said late colonys in which such lands, tenements or hereditaments lay, and all deeds of bargain and sale, titles and conveyances whatsoever, of any lands, tenements or hereditaments within this province, that since the establishment of the present government have been or shall hereafter be had, made, gotten, obtained or procured from any Indian or Indians, by any person or persons whatsoever, without the licence, approbation and allowance of the great and general court or assembly of this province for the same, shall be deemed and adjudged in the law to be null, void and of none effect: *provided, nevertheless,*—...

*And be it further enacted by the authority aforesaid,*

[SECT. 4.] That if any person or persons whatsoever shall, after the publication of this act, presume to make any purchase or obtain any title from any Indian or Indians for any lands, tenements or hereditaments within this province, contrary to the true intent and meaning of this act, such person or persons so offending, and being thereof duly convicted in any of his majestie's courts of record within this province, shall be punished by fine and imprisonment,

at the discretion of the court where the conviction shall be, not exceeding double the value of the land so purchased, nor exceeding six months' imprisonment.

[SECT. 5] That all leases of land that shall at any time hereafter be made by any Indian or Indians for any term of years, shall be utterly void and of none effect, unless the same shall be made by and with licence first had and obtained from the court of general sessions of the peace in the county where such lands lye: *provided nevertheless*, that nothing in this act shall be taken, held or deemed in any wise to hinder, defeat or make void any bargain, sale or lease of land made by one Indian to another Indian or Indians.

*The Constitution of the United States of America, 1789.* Art. I, §2, para. 3, cl. 5 as amended by the IV$^{th}$ Amendment: Representatives shall be apportioned among the several States according to their respective numbers, excluding Indians not taxed. Art. I, §8, para. 3: The Congress shall have Power...To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes. Art. I, §9, para. 3: No...ex post facto Law shall be passed. Art. I, §10, para. 1, cl. 1: No State shall enter into any Treaty. Art. I, §10, para. 1, cl. 5: No State shall pass any...ex post facto Law, or Law impairing the Obligation of Contracts. Art. II, §1, para. 1, cl. 1: The executive Power shall be vested in a President of the United States of America. Art. II, §2, para. 2, cl. 1: He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. Art. III, §1, cl. 1: The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. Art. III, §2, para. 1, cl. 5 as amended

by the 11th Amendment: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—...to Controversies between two or more States...and between a State, and foreign States. Art. III, §2, para. 2, cl. 1. In all Cases...in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction., both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. Art. V: The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;... 10th Am. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

*Marshall v. Clark,* 1 Kentucky R. 77, 80-81 (1791). The old claim of the crown, by the treaty of 1763, extended to, and was limited by the Mississippi including the land in dispute, which gave a right to the crown as against other European nations, and fixed the limits of titles to be derived from that source to the citizens of Virginia. The dormant title of the Indian tribes remained to be extinguished by government, either by purchase or conquest, and when that was done, it inured to the benefit of the citizens who had previously acquired a title from the crown, and did not

authorize a new grant of the lands as waste and unappropriated. This being the case at the time of revolution, when the commonwealth succeed[ed] to the royal rights...in the opinion of the court, the Indian title did not impede either the power of the legislature to grant the land to officers and soldiers, or to the location of the lands on treasury warrants, the grantee in either case must risk the event of the Indian claim, and yield to it if finally established, or have the benefit of a former or future extinction thereof.

*Weiser v. Moody*, 2 Yeat's 127, 127-8 (Penn. SC) (1796). The court declared their opinion to the jury, that if the late proprietaries, or their officers, knew that the lands surveyed for Conrad Weiser, lay out of the then Indian purchases, and granted them under full knowledge thereof, the patent would enure for the benefit of the grantee, when the lands came afterwards to be purchased from the Indians; and the proprietaries could not pass the title to a stranger....[But] it cannot be presumed that the proprietary officers knew the lands surveyed for Conrad Weiser to be without the limits of their purchases [from the Indians]....If the King is deceived in his grant, it will be avoided. Any contract or deed will be vitiated by a *legatio falsi sive suppressio veri.*

*Sherer v. McFarland*, 2 Yeat's 124, 225, 226 (Penn. SCR) (1797). We are no enemies to *bona fide* improvements, restricted within rational limits. But these were never deemed to extend beyond land purchased from the Indians. Such as system would be wild, as well as highly impolitic, and would tend to deluge the country in blood, by provoking the savage nations to hostilities....It must be admitted, that the lords of the soil had the exclusive right of disposing of their lands in their own mode.

*Fletcher v. Peck*, 6 Cranch's 87, 142-3 (1810). The majority of the Court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it has been legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.

*Johnson v. McIntosh*, 8 Wheat. 543, 574, 585, 588, 591, 592, 596 (1823). [The different nations of Europe] claimed and exercised, as a consequence of their ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy....They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, according to their own discretion.... While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been well understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy....It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it....All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy....[T]he Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession their lands, but to be incapable of transferring

the absolute fee to others....[T]he Indian title, which, although entitled to the respect of all Courts until it should be extinguished, was declared not to be absolutely repugnant to a seisin in fee on the part of the State. ...The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to that title. The lands, then, to which this proclamation referred, were lands which the king had had a right to grant, or to reserve for the Indians.

*Danforth v. Wear*, 9 Wheat. 673, 675, 677 (1824). As to lands surveyed within the Indian boundary, this Court has never, hesitated to consider all such surveys and grants as wholly void...[although it was argued that the State grant] was only suspended by the Indian title, and attached legally and effectually to the soil, as soon as the interposing title of the Indians was removed...the inviolability of the Indian territory is fully recognized.

*Cornet v.* Winton, 2 Yerger Tenn. CA 129, 149 (1826). ...the Indian nation was no party to this grant; its usufructory title was not thereby affected. North Carolina had no right to take it from the Indians for Stuart's benefit, without their consent; this consent they have not given, and therefore no right to prosecute this action to recover the possession of the land has ever vested in Stuart; hence he must fail upon the weakness of his own title.

*Cherokee Nation v. State of Georgia*, 5 Pet. 1, 17, 49, 76 (1831). Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with

strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.... While the different nations of Europe respected the rights of the natives as occupants they asserted the ultimate dominion to be in themselves; and claimed and exercised as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy....They have not stipulated to part with that right (of occupancy); and until they do, their right to the mines stands upon the same footing as the use and enjoyment of any other part of their territory.

*Worcester v. Georgia*, 6 Pet. 515, 542, 544, 545, 546, 552, 553, 559, 560, 583 (1832)....discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments....This principle...gave...the sole right of acquiring the soil and making settlements on it...It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. The relation between Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preemptive privilege in the particular place.

The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them....So with respect to the word "hunting grounds." Hunting was at that time the principle occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved. To the United States, it could be matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional village, an occasional corn field, interrupted and gave some variety to the scene. These terms had been used in their treaties with Great Britain and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government...This was the exclusive right of the purchasing such lands as the natives were willing to sell....These grants asserted a title against Europeans only, and were considered as blank pieces of paper so far as the rights of the natives were concerned....The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians...the Indian nations possessed a full right to the lands they occupied...Except by compact we have not even claimed a right of way through the Indian lands.

*Mitchell v. United States*, 9 Peter's 711, 745, 746, 749, 755 (1835). We come now to consider the nature and extent of the Indian title...Indian possession or occupation was considered with the reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their right to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals...One uniform rule seems to have prevailed...by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in the possession of the Indians, though possession could not be taken without their consent. Individuals could not purchase Indian lands without permission or licence from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such licence, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the licence, the title of the purchaser became complete....The King waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property they could cede or reserve, and that the boundaries of his territorial rights should be such, and such only, as were stipulated by these treaties. This brings into practical

operation another principle of law settled and declared in the case of *Campbell v. Hall*, that the proclamation of 1763, which was the law of the provinces ceded by treaty of 1763, was binding on the king himself, and that a right once granted by a proclamation could not be annulled by a subsequent....[L]and were of two descriptions: such as had been ceded to the king by the Indians, in which he had full property and dominion, and passed in full property to the grantee; and those reserved and secured to the Indians, in which their right was perpetual possession, and his the ultimate reversion in fee, which passed by the grant, subject to the possessory right... This proclamation was also the law of all the North American colonies in relation to crown lands.

*New Orleans v. Armas*, 9 Pet. 224, 236 (1835). [I]t is a principle applicable to every grant, that it cannot affect pre-existing title.

*New Orleans v. United States*, 35 US 662, 730 (1836). It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantee.

*United States v. Fernandez*, 35 US 303, 305 (1836). Nor does there appear to have been any restriction on the powers of the governor to make grants of land under Spain, other than those imposed upon the governors of Great Britain: both made grants without regard to the land being in the possession of the Indians: they were valid to pass the right of the crown, subject to their right of occupancy:...

*Clark v. Williams*, 36 Mass. R. 499, 500, 501 (1837). The object of this statute manifestly was, to secure the Indians

from being deceived and imposed upon, and to enable the government to avail themselves of the full benefit of the crown grant of the lands to themselves and their grantees, by giving them the exclusive privilege of extinguishing and acquiring the Indians' right of occupancy...[W]e think it manifest, that this law was made for the personal relief and protection of the Indians, and it is to be limited in its operation. It is to be used as a shield, not as a sword.

*Godfrey v. Beardsley,* 2 McLean 412, 416 (Ind.) (1841). The Indian right is that of occupancy; and, until this right shall be extinguished by purchase, no possession can be taken. It is also admitted, that a mere reservation of the Indian right to a certain part, within the described boundaries, leaves the right reserved, as it stood before the cession.

*Balliot v. Bauman,* 5 Penn. 150, 154, 155 (1843). A patent is not operative against the rights of a third person existing before the issuing of the patent. He may show that his right is better than the one who obtained the patent and for that purpose may inquire into the prior title of the patentee....[and] show his own equitable title is better. The patent conveys the full legal title of the state.

*Brown v. Wenham,* 10 Metcalf 496, 498 (Mass. SC)(1843). The provincial St.13 Wm 3, (1701,) entitled "an act to prevent and make void clandestine and illegal purchases of lands from the Indians," rendered void, as the foundation of title, all deeds made by Indians, without the license or approbation of the legislature, after the year 1633. ["St.13 Wm 3, (1701,)" is an alternative citation for *An Act to prevent and make void clandestine and illegal purchases of lands from the Indians,* Stat. Prov. Mass. Bay 1701-02, c. 11.]

*Coleman v. Tish-Ho-Mah*, Smedes & M. 40, 48 (Miss. HCEA) (1844). Theirs was a right to retain possession, and to use it according to their own discretion, though not to dispose of the soil except to the government. That claimed the ultimate dominion, and the exclusive right to grant the soil, subject to the Indian right of occupancy.

*Ogden v. Lee*, 6 Hill's 546, 548, 549 (NYSC) (1844). The European governments whose people discovered and made settlements in North America, claimed the sovereignty of the country, and the ultimate title, but not the immediate right of possession, to all lands within their respective limits. Upon the principle laid down by Vattel, (B. 1, & 81, 209,) they might have asserted a larger right; for the natives lived by fishing and hunting, without converting to the purposes of agriculture any considerable portion of the of the vast tracts of the country over which they wandered. But the Europeans pursued the more just and politic course of acquiring the Indian title by purchase. The claim which they set up and asserted amounted to little more than a right of preemption, or the right of purchasing from the Indians all the lands within the bounds of their respective discoveries, to the exclusion of all other nations. It is true that the British crown granted charters and issued patents for large tracts of land before the Indian right had been extinguished; and these instruments purported to convey the property in fee. It was so of the grant made by Charles the second to his brother the duke of York in 1664, which included all the territory now constituting the states of New-York and New-Jersey. But these grants were not intended to convey, and the grantees never pretended that they has acquired an absolute fee in the land. They neither took nor claimed any thing more than the ultimate fee, or the right of dominion after the Indian title should be

extinguished. And so far as the state of New-York is concerned, I am happy to say, that beyond what may have been acquired by conquest in lawful war, the Indians have never been deprived of a single foot of land without their voluntary consent. Their title by occupancy has been uniformly acknowledged, both by the colonial and state governments, from the first settlement of the country down to the present day; and it cannot now be successfully questioned in the judicial tribunals.

*Stockton v. Williams,* 1 Mich. R. 546, 560 (SC) (1845). The power of the government to grant the soil while in the possession of the Indians, and subject to their right of occupancy, is a proposition which has long since been settled by a series of decisions of authority.

*Fellows v. Lee,* 5 Denio 628 (NYCE) (1846)....the Indian title to lands is an absolute fee, and that the pre-emption right conceded to Massachusetts, was simply a right to acquire by purchase from the Indians their ownership of the soil, whenever they should chose to sell it.

*Montgomery v. Ives,* 13 Smedes & M. 161, 174-5 (Miss. HCEA) (1849). Let us refer to the proclamation of George III... "that it is just, and reasonable, and essential to our interest and the security of our colonies, that the several nations or tribes of Indians, with whom we are connected, and who live under our protection, should not be disturbed in the possession of such parts of our dominions and territories, as not having been ceded to, or purchased by us, are reserved to them, or any of them, as their hunting grounds." It then goes on to declare, that no governor, in any of the said provinces, shall presume, "upon any pretence whatever, to grant warrants of survey, or pass any patents for lands, beyond the bounds of their respective

governments, as described by their commissions." It farther declares, "that, for the present, all the lands not included within the limits of said new governments, shall be reserved to under the sovereignty, protection and dominion of the crown, and forbids all purchases and settlements beyond those limits without special leave and license first obtained." It goes on still farther to declare a principle which seems to have been adhered to ever since, "that no private person do make purchase of any land from any Indians, but that the same shall be purchased only for the government, in the name of the sovereign, at some public meeting of the Indians." This principle, the offspring of a just and enlightened policy, became incorporated into the intercourse of England, with the Indian tribes, and has been adopted and pursued by our own government, in all its transactions with them....On this part of the proclamation of 1763, the Supreme Court of the United States say, "This reservation is a suspension of the powers of the royal governor, within the territory reserved." *Fletcher v. Peck*, 6 Cranch, 142. It is because of this suspension, which existed at the date of this grant, that we think it has no intrinsic validity. It is an established principle in our jurisprudence, that a grant of land on which the Indian title has not been extinguished, is void. *Danforth v. Wear*, 9 Wheat. 676.

*Breaux v. Johns*, 4 Louisiana R. 141, 143 (1849). These grants convey a title to the grantees, subject only to the Indian right of occupancy.

*Gaines v. Nicholson*, 9 How. 356, 365 (1850). No previous grant of Congress could be paramount, according to the rights of occupancy which this government has always conceded to the Indian tribes within her jurisdiction. [The reservation] was so much carved out of the Territory ceded, and remained to the Indian occupant, as he never parted

with it. He holds, strictly speaking, not under the treaty of cession, but under his original title, confirmed by the government in the act of agreeing to the reservation.

*Marsh v. Brooks*, 49 US 223, 232 (1850)....Indian title consisted of the usufruct and right of occupancy and enjoyment; and, so long as it continued, was superior to and excluded those claiming the reserved lands by patents made subsequent to the ratification of the treaty; they could not disturb the occupants under the Indian title. That an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question.

*People v. Dibble*, 18 Barbour's NYSCR 412, 418 (1854). The object of the law, with various other laws of the state, was to protect the indians to quiet them and render them secure.

*Scott v. Sandford*, 19 How. 393, 403, 404, 405, 407, 420, 426, 432, 435, 449, 450, 452, 460, 483, 484, 485, 501, 506, 508, 509, 513, 520 (1857). The question is simply this: can a negro, whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such entitled to all the rights and privileges, and immunities guaranteed by that instrument to the citizen?...The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be [404]

subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian governments were regarded and treated as foreign Governments as much as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first immigrants to the English colonies to the present day, by the different Governments which succeeded to each other. Treaties have been negotiated with them, and these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under the subjection of the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over the territory they occupy. But they may, without doubt, like the subjects of any foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up abode among the white population, he would be entitled to all the rights and privileges which would belong to any emigrant from any other foreign people...[405] It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed this sovereignty and framed the Constitution. The duty of the Court is to interpret the instrument they have framed, with the best lights we can obtain on the

subject, and to administer it as we find it, according to its true intent and meaning when it was adopted....[407] It is difficult at this day to realize the state of public opinion in relation to that unfortunate race [Africans], which prevailed in the civilized and enlightened portions or the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nations displays it in a manner too plain to be mistaken. They had for more than a century before been regarded as beings of an inferior order, and altogether unfit with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect:...[420] Congress might...have authorized the naturalization of Indians, because they were aliens and foreigners. But, in their untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they have recently committed, when they were allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even guarding themselves against the threatened renewal of Indian hostilities. No one would have supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word was not used with any particular reference to them. Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them, and therefore no there was no necessity for using particular words to exclude them....[426] No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race [African slaves], in the civilized nations of

Europe or in this country, should induce this court to give to the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called upon to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption....Any other rule would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty....And upon a careful consideration of the subject, Dredd Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts;...[432] The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except for punishment for crime, shall be forever prohibited in all the part of the territory ceded by France, under the name Louisiana,...and the difficulty which meets us at the threshold of this part of the enquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority was not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under any one of the United States...[435]...this Government was to be carefully limited in its powers, to exercise no authority beyond those expressly granted by the Constitution, or necessarily to be implied from the language of the instrument, and the

objects it was intended to accomplish;...[449] It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers, which the Constitution denied to it...[450]...and the Federal Government can exercise no right power over his person or property beyond what the instrument confers, nor lawfully deny any right which it has reserved...And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. [452] Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding or owning property of this kind in the territory of the United States north of the line mentioned, is not warranted by the Constitution, and is therefore void;...[460] Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory; and, her laws affect and bind all property and persons residing within it...And it is equally true, that no State or nation can affect or bind out of its territory, or persons not residing within it....[480]...to change or to abolish a fundamental principle of the society, must be the act of the society itself—of the *sovereignty*; and that none other can admit to the participation of that high attribute. [483]...each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature...power or weakness does not make any difference. A small republic is no less sovereign than the most powerful kingdom...[484]and no one nation is entitled to dictate a form of government or religion, or a course of internal policy, to another. [485] Sovereignty, independence, and a perfect right of self-government, can

signify nothing less than a superiority to and exemption from all claims of extraneous power, however expressly they may be asserted, and render all attempts to enforce such claims merely attempts at usurpation. [501] But the recognition of a plenary power in Congress to dispose of the public domain, or to organize a Government over it, does not imply a corresponding authority to determine the internal policy, or to adjust the domestic relations, or the persons who may lawfully inhabit the territory in which it is situated....[506] This [the inflation of federal plenary jurisdiction] proceeds from a radical error, which lies at the foundation of much of this discussion. It is, that the Federal Government may lawfully do whatever is not directly prohibited by the Constitution. This would have been a fundamental error, if not amendments to the Constitution had been made. But the final expression of the will of the people of the States, in the 10th amendment, is, that the powers of the Federal Government are limited to grants of the Constitution. [508] In Pollard's Lessee v. Hagan, (3 How., 212,) the court say; "The United States have no constitutional capacity to exercise municipal [509] jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in cases where it is delegated, and the court denies the faculty of the Federal Government to add to its powers by treaty or compact." [513]...a power to make rules and regulations respecting the public domain does not confer a municipal sovereignty over persons and things upon it. [520] The King of Great Britain, by his proclamation of 1763, virtually claimed that the country west of the mountains had been conquered from France, and ceded to the Crown of Great Britain by the treaty of Paris of that year, and he says: "We reserve it under our sovereignty, protection and dominion, for the use

of the Indians." This country was conquered from the Crown of Great Britain, and surrendered to the United States by the treaty of peace of 1783.

*Fellows v. Denniston,* 23 NY 420, 423, 428, 431 (CA)(1861). The nature of the aboriginal title, and that of the State within which the lands lie, has been so often defined by judicial determination that no time need now be spent on it. (*Johnson v. McIntosh,* 8 Wheat., 543; *Fellows v. Ellsworth,* 6 Hill, 546; S.C., 5 Denio, 528.) The Indian nation, in a collective or national capacity, has the right of occupancy of the land, but no power to sell or in any way dispose of it to others, except to the State, or to persons authorized by it to purchase; and the government of the State has the ultimate right of the soil, or title in fee simple, subject to the Indian right of occupancy. The right to purchase the Indian claim, or, in the language usually employed, to extinguish the Indian title, thus existing in the State or in its grantees, is usually called the right of preemption....If the purchaser acquires no right to interfere with the Indian occupancy, the subject of his purchase is limited to the title of the grantees under the State of Massachusetts; and he acquires nothing more. This, we have seen, is the right of preemption, and perhaps it embraces also a technical fee; but, as it does not embrace the Indian right of occupancy, but expressly excludes it, and that is the only right which the Indians had, it is clear that they are not prejudiced by the tax or by any sale which may take place pursuant to it. The title of the grantees under Massachusetts to these lands, before the extinguishment of the Indian title, subject as it was to the right of possession remaining in the Indians for an indefinite period, was not liable to taxation and sale under the general laws of the State relative to the assessment of taxes.... Each of the three Constitutions

successively adopted by the people of the State has contained a provision like that in the first Constitution, which was in these words: "No contracts or purchases for the sale of lands made since the 14th day of October, A.D. 1775, or which may be hereafter made with or of the said Indians, within the limits of this State, shall be binding on the said Indians, or be deemed valid, unless made either under the authority and with the consent of the Legislature of this State."

*United States v. Foster*, 2 Bissell's 377, 377 (Wisc. Cir. Ct.) (1870). It may be doubted whether this reservation can be sold by the United States in the present condition of the title, even by act of Congress, without the consent of the Indians themselves, but it is certain that it cannot be without an express law; and if the precedents which have always existed in such cases should be followed, it cannot, and ought not to be sold by the Government, until the rights of the Indians are purchased, and with their free consent.

*Minter v. Shirley*, 3 Miss. 376, 381, 382 (1871). The right to acquire and extinguish their title pertained exclusively to the United States, therefore purchases, made from them separately, or as tribes, were null and void....The several acts of congress, in reference to the survey and sale of the public lands, distinctly keep in view the fact "that the Indian title must first have been extinguished, and acquired by the United States, before individual right to any part of the soil can be derived and vested."

*Holden v. Joy*, 84 US 211, 244 (1872). Obviously this principle regulated the right conceded by discovery among the discoverers, but it did not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a more ancient discovery. It gave the

exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell....Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs.

*Lara v. US*, 541 US___(2004)(Thomas, J.) In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously.... In 1871, Congress enacted a statute that purported to prohibit entering into treaties with the "Indian nation[s] or tribe[s]." 16 Stat. 566, codified at 25 USC §71. Although this Act is constitutionally suspect (the Constitution vests in the President both the power to make treaties, Art. II, §2, cl. 2, and to recognize foreign governments, Art. II, §3; see, *e.g., United States v. Pink*, 315 US 203, 228-230 (1942)), it nevertheless reflects the view of the political branches that the tribes had become a purely domestic matter. To be sure, this does not quite suffice to demonstrate that the tribes lost their sovereignty. ...Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases. ((note 4)...this is precisely the confusion that I have identified and that I hope the Court begins to resolve.) ...I believe we must examine more critically our tribal sovereignty case law. Both the Court and the dissent, however, compound the confusion by failing to undertake the necessary rigorous constitutional analysis. I would begin by carefully following our assumptions to their logical conclusions and by identifying the potential sources

of federal power to modify tribal sovereignty....I do, however, agree that this case raises important constitutional questions that the Court does not begin to answer. The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty...and I would be willing to revisit the question....The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain the tribes possess anything resembling "sovereignty." The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty. Such an acknowledgement might allow the Court to ask the logically antecedent question *whether* Congress (as opposed to the President) has this power. A cogent answer would serve as the foundation for the analysis of the sovereignty issues posed by this case. We might find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense. But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.

## Canada

*Royal Proclamation of 1763.* The several Nations or Tribes of Indians with whom We are connected and who live under our Protection should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as not having been ceded to or purchased by Us are reserved to them as their Hunting Grounds.

*Campbell v. Hall*, (1774), 98 ER 848, 898 (JCPC). If the King has power (and when I say the King, I mean in this case to be understood "without the concurrence of Parliament") to make laws for a conquered country, this being a power subordinate to his own authority, as a part of the supreme Legislature in Parliament, he can make none which are contrary to fundamental principles.

John Elmsley, Chief Justice of Upper Canada, "Report to the Executive Council of Upper Canada dated October 22, 1798, PAC, RG1, E1, V46, State Book 'B', pp. 210-14. It is no secret to any person at all acquainted with the present state of Indian Affairs that the aborigines of this Part of His Majesty's American Dominions are beginning to appreciate their lands not so much by the use which they themselves, as by the value at which they are estimated by those who purchase them, and either cultivate them, or dispose of them in their natural state. It is equally notorious, that if the Indians wanted penetration to make the discovery, there are a great many persons of European origin who have attached themselves to the several Tribes which surround us, and will not fail to inform them that the value of any article depends as much upon its importance to the purchaser, as on its usefulness to the present possessors.

But if this were doubtful now, when the lands purchased from the Indians are distributed among His Majesty's Subjects at a Fee hardly exceeding the prime cost of them, it cannot possibly remain so when the Indians discover as they unquestionably will, that the purchases made from them are to be converted into a source of Revenue to ourselves—slow as their progress is towards civilization they are perfectly apprised of the value of money and of its use in maintaining them in those habits of

indolence and intemperance to which most of them are more or less inclined.

In order to therefore to exercise that foresight which our Indian neighbours are beginning to learn, and in which it certainly cannot be our interest to promote their improvement, we submit for your Honour's consideration the propriety of suspending the promulgation of the plan which has been laid down for us until we can make a purchase sufficiently large to secure for us the means of extending the population and encreasing the strength of the Provinces so far as to enable us before our stock is exhausted to dictate instead of soliciting the terms on which future acquisitions are to be made.

*Cameron v. Kyte*, (1835), 12 ER 678, 682 (JCPC). If a Governor had, by virtue of that appointment, the whole sovereignty of the Colony delegated to him as a Viceroy, and represented the King in the government of that Colony, there would be good reason to content that an act of sovereignty done by him would be valid and obligatory upon the subject living within his government, provided the act would be valid if done by the Sovereign himself...But if the Governor be an officer, merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the authority so given to him, would be purely void, and the Courts of the Colony over which he presided could not give it any legal effect. We think the office of the Governor is of the latter description, for no authority or dictum has been cited before us to show that a Governor can be considered as having the delegation of the whole Royal power, in any colony, as between him and the subject, when it is not expressly given by his commission. And we are not aware that any commission to

colonial governors conveys such an extensive authority..." [N.B. this precedent establishes the same principle for Ontario as did *Scott v. Sandford*, 19 How. 393 (1857) relative New York, namely, non-native institutions of law and government do not have *Plenum Dominium* (plenary jurisdiction) but, rather, have only the constitutionally-delegated jurisdiction to treat with the Indigenous sovereign for the contractual acquisition of the greater power.]

*Bown v. West*, (1846), 1 E&A 117, 118 (Upper Canada). The government, we know, always made it their care to protect the Indians, so far as they could, in the enjoyment of their property, and to guard them against being imposed upon and dispossessed by the white inhabitants...we cannot be supposed to be ignorant of the general policy of the government, in regard to the Indians, so far as has been manifest from time by orders of council and proclamations, of which all people were expected and required to take notice.

*Constitution, 1867*, s. 90....Disallowance of Acts,...shall extend and apply to the Legislatures of the several Provinces...s. 91(24)...the exclusive Legislative authority of the Parliament of Canada extends to...Indians, and lands reserved for the Indians. s. 92(13). In each Province the Legislature may exclusively make Laws in relation to Property and Civil Rights within the Province. s. 109. All Lands...shall belong to the several Provinces...subject to...any Interest other than that of the Province in the same. s. 129. Except as otherwise provided by this Act, all Laws in force...at the Union, shall continue in Ontario...as if the Union had not been made. s. 132. The Parliament and

Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

*Connelly v. Woolrich*, (1867), 11 LCJ 197, 205-07 (SC Quebec), affirmed (1869), RLOS 356-7 (CA Quebec)....will it be contended that the territorial rights, political organization such as it was, or the laws of the Indian tribes, were abrogated—that they ceased to exist when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not—that so far from being abolished, they were not even modified in the slightest degree in regard to the civil rights of the natives. As bearing upon this point, I cannot do better than to cite the decision of learned and august tribunal—the Supreme Court of the United States. In the celebrated case of *Worcester against the State of Georgia*, (6th Peters Reports, pages 515-542), Chief Justice Marshall—perhaps one of the greatest lawyers of our times—in delivering the judgment of the Court, said:

> **America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered,**

which annulled the pre-existing rights of its ancient possessors.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in the possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting and fishing.

Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the Creator of all things, conferred these rights over hunters and fishermen, on agriculturalists and manufacturers?

But power, war, conquest give rights, which after possession, are conceded by the world; and that can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin, because holding it in our recollection might shed some light on existing pretensions.

The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any of them to grasp the whole; and the claimants too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously for all, it was necessary for the

nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, "that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession." Johnson vs. McIntosh, 8 Wheaton's Rep., 543.

This principle, acknowledged by all Europeans, because it was in the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one that could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preemptive privilege in the particular place. The United States succeeded to all, the claims of Great Britain, both territorial and political; but no attempt so far as is known, has been made to enlarge them. So far as they existed merely in theory,

or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist; are asserted by the one, and admitted by the other.

Soon after Great Britain determined upon planting colonies in America, the king granted charters to companies of his subjects who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect claim; nor was it so understood.********

Certainly it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the

> **agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only.**

Though speaking more particularly of Indian lands and territories, yet the opinion of the Court as to the maintenance of the laws of the Aborigines, is manifest throughout. The principles laid down in this judgment, (and Mr. Justice Story as a Member of the Court concurred in this decision), admit of no doubt.

*Connelly v. Woolrich,* (1869), RLOS 356-7 (CA Quebec). Even the United States are careful to acquire the Indian title, either by purchase or by other conventional means, before occupancy can be allowed, or public grants made.

*Order in Council (Canada) of 23 January 1875.* The 40th article of the treaty of Capitulation of Montreal, dated 8th September 1760, is to the effect that:

> **The Savages or Indian allies of His Most Christian Majesty shall be maintained in the lands they inhabit if they choose to remain there.**

The Proclamation of King George III 1763...*such parts of our dominions and territories*, as not having been purchased by Us, are reserved to them, or any of them as their hunting grounds;...*or upon* any lands whatever, which not having been ceded to or purchased by us, as aforesaid,

are reserved to the said Indians, or any of them...*And we do further strictly enjoin and require all persons whatsoever, who may have either wilfully or inadvertently seated themselves upon any lands within the Countries above described, or upon any other lands,* which not having been ceded to or purchased by us, are reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements...

The Undersigned would also refer to the BNA Act 1867 Sec. 109, applicable to British Columbia, which enacts that, all lands belonging to the Province shall, belong to the Province "subject to any trust existing in respect thereof, and to any interest other than the Province in the same."...

The Undersigned, therefore, feels it incumbent upon him to recommend that this [public lands] Act be disallowed.

*St. Catherines Milling and Lumber Company Ltd. v. The Queen,* (1888), 14 AC 46, 53-55, 60 (JCPC). Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest surrendered by the treaty. The ceded territory was at the time of the Union land vested in the Crown, subject to "an interest other than that of the Province in the same" within the meaning of sect. 109;...the [treaty's] legal consequences ...opened up for settlement, immigration, and such other purpose as to Her Majesty might seem fit...there has been all along vested in the Crown a substantial and paramount estate underlying the Indian title, which became a *plenum dominium* [plenary jurisdiction] whenever that title was surrendered or otherwise extinguished.

*AG Ontario v. AG Canada: In re Indian Claims,* [1897] AC 199, 210-11 (JCPC). The beneficial interest in the territories ceded by the Indians under the treaties became vested, by virtue of s. 109, in the Province of Ontario....The effect of the treaties was, that, whilst the title to the lands continued to be vested in the Crown, all beneficial interest in them, together with the right to dispose of them, and to appropriate their proceeds, passed to the Government of the Province.

"An interest other than that of the province in the same" appears to them [their Lordships] to denote some right or interest in a third-party, independent of and capable of being vindicated when in competition with the beneficial interest of the old province.